No. 85-986

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In The

Supreme Court of the United States

October Term, 1985

JOSEPH GISSARO,

Petitioner,

vs.

GROSS AND HECHT TRUCKING COMPANY, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

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On the Petition

QUESTIONS PRESENTED

1. Whether an individual union member has standing pursuant to 29 U.S.C. § 185(a) to vacate an arbitration award that adversely affects contract rights specific to him, where the union consents to the member's action and no question of the union's duty of fair representation is raised.

2. Whether the six-month limitations period adopted by this Court in *Del Costello v. Teamsters*, 462 U.S. 151 (1983), applies to employee actions pursuant to 29 U.S.C. § 185(a) to vacate arbitration awards that manifest infidelity to the collective bargaining agreement, where no question of the union's duty of fair representation is raised.

3. Whether, if state law governs the limitations period in an employee action to vacate an arbitration award, the "discovery rule" applies to toll commencement of the limitations period until the employee knew or should have known the basis for the arbitrator's award.

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No.

In The

Supreme Court of the United States

October Term, 1985

JOSEPH GISSARO,

Petitioner,

vs.

GROSS AND HECHT TRUCKING CO., INC.,

Respondent.[1]

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

The petitioner Joseph Gissaro respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Superior Court of New Jersey, Appellate Division entered on this proceeding on April 29,1985.

1. Local 807, International Brotherhood of Teamsters, was a plaintiff in the proceedings below before the New Jersey Superior Court, Chancery Division.

OPINIONS BELOW

The opinion of the Superior Court of New Jersey, Appellate Division not yet reported, and the unpublished opinion of the Superior Court of New Jersey, Chancery Division, appear in the Appendix hereto.

JURISDICTION

The judgment of the Superior Court of New Jersey, Appellate Division was entered on April 29, 1985. A timely petition for certification was denied by the Supreme Court of New Jersey on September 9, 1985, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

STATUTORY PROVISIONS INVOLVED

Labor Management Relations Act, United States Code, Title 29:

§ 160(b)

> . . .no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge . . . .

National Labor Relations Act, United States Code, Title 29:

§ 171 Declaration of purpose and policy.

It is the policy of the United States that—

(a) sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interests of employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining between employers and the representatives of their employees.

§185(a)

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

New Jersey Arbitration Act, N.J.S.A. 2A:24-7

• • •

A party to the arbitration may, within 3 months after the award is delivered to him, unless the parties shall extend the time in writing, commence a summary action in the court aforesaid for the confirmation of the award or for its vacation, modification or correction. Such confirmation shall be granted unless the award is vacated, modified

or corrected. Such confirmation shall be granted unless the award is vacated, modified or corrected.

STATEMENT OF THE CASE

In this action, petitioner Joseph Gissaro, formerly employed by respondent Gross and Hecht Trucking, Inc., seeks to enforce the terms of a collective bargaining agreement requiring that Gross and Hecht employees be given a written warning prior to discharge. Petitioner's union, Local 807, International Brotherhood of Teamsters (IBT), was a co-plaintiff in the arbitration concerning petitioner's discharge, and in the New Jersey Superior Court, Chancery Division action to vacate the arbitration award upholding the discharge. The union has consented to petitioner's action to enforce the contract on his own behalf.

Petitioner was employed by respondent Gross and Hecht Trucking, Inc., in July of 1977, and was a member in good standing of Local 807, IBT since September of 1977. IBT has a collective bargaining agreement with respondent Gross and Hecht under which petitioner was employed and was a beneficiary. The collective bargaining agreement specifically provides for written notice and warning of the specific complaint against any employee prior to discharge or suspension, and sets forth the causes for immediate discharge not requiring such notice and warning.[2]

On January 12, 1983 petitioner was discharged by respondent, purportedly for failing to appear at his place of employment without notifying his employer. Petitioner never received a

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2. Article 47, Sections 1 and 2, National Master Freight Agreement and New York-New Jersey Area General Trucking Supplemental Agreement. The cited provisions of the collective bargaining agreement are quoted verbatim in the Appendix hereto.

warning, written or oral, prior to his immediate discharge, in direct violation of the collective bargaining agreement.

The collective bargaining agreement also has a provision establishing an arbitration procedure for disputes arising under the agreement. The agreement specifically limits the power of arbitrators and joint committees to application of the contract.[3] Pursuant to this provision, the union filed notice of arbitration contesting petitioner's discharge.

Petitioner's grievance was processed through the various steps set forth in the contract, and ultimately a hearing before an arbitrator was held on May 26, 1983. At the hearing, petitioner was represented by the union's attorney.

Although the arbitrator rendered an award on July 7, 1983 upholding petitioner's discharge (which was sometime thereafter served upon the union) petitioner was unable to obtain a copy of the award despite repeated requests. Petitioner thereupon retained an attorney and received a copy of the award from his attorney on September 28, 1983. The award had been delivered to his attorney on September 16, 1983.

On December 14, 1983, petitioner and the union filed a summary action in New Jersey Superior Court, Chancery Division seeking vacation of the arbitrator's award on the grounds that, *inter alia*, the award was not grounded in the collective bargaining agreement, the arbitrator had exceeded his authority and acted arbitrarily and capriciously, and the arbitrator had exhibited bias and partiality.

In their initial briefs before the trial court both petitioner

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3. Article 8, Section 7 of the Master Freight Agreement. This provision is printed in pertinent part in the Appendix hereto.

and respondent invoked the National Labor Relations Act and the Labor Management Relations Act, 29 U.S.C. §§ 141, 185(a) as providing the legal standard controlling interpretations of collective bargaining agreements and the scope of the court's review of arbitration awards. The trial judge specifically requested supplemental briefs from both parties on the question of petitioner's standing as an individual employee to bring, with his union's consent, an action to vacate an arbitration award.

On April 25, 1984, the trial judge issued an opinion dismissing petitioner's complaint, specifically relying on federal labor statutes and court decisions in holding that petitioner did not have standing independent of the union to vacate an arbitration award. *See* Appendix 11a. The trial court applied the ninety (90) day limitations period of the New Jersey Arbitration Act, N.J.S.A. 2A:24-7 to the action and dismissed the union as untimely. The trial court equitably tolled the running of the limitations period as to petitioner, however, because of his delay in obtaining a copy of the arbitrator's award, and found his action to be timely.

Petitioner appealed from that decision. In their briefs before the New Jersey Superior Court, Appellate Division, petitioner and respondent each addressed both the standing issue under 29 U.S.C. § 185(a) the timeliness issue. Petitioner maintained that the six-month limitations period borrowed by this Court in the then-recent case *Del Costello v. Teamsters,* 462 U.S. 151 (1983) should apply to petitioner's action to vacate the arbitrator's award.

The New Jersey Superior Court, Appellate Division issued an opinion and judgment on April 29, 1985, wherein it specifically addressed the questions of federal law presented in this petition for certiorari. The Appellate Division held that the appropriate limitations period for petitioner's action was the ninety (90) day period established in the New Jersey Arbitration Act, and that the six month limitations period adopted by this Court in *Del Costello*

> . . . is only applicable to suits by an employee against an employer *and* a union "alleging that the employer had breached a provision of a collective bargaining agreement, and that the union had breached its duty of fair representation by mishandling the ensuing grievance-and-arbitration proceedings."

[*Quoting Del Costello,* 462 U.S. at 154; emphasis in original.] *See* Appendix at 7a.

The Appellate Division found that both petitioner and the union were precluded by the three month time bar of N.J.S.A. 2A:24-7, and that the facts of this case did not justify equitable tolling of the limitations period for petitioner. *See* Appendix 6a. The court found further that pursuant to N.J.S.A. 2A:24-7 petitioner lacked standing to bring an action to vacate an arbitration award because he was not a "party" to the arbitration, and, citing federal and state laws, ruled that petitioner could have standing to commence such an action only if he named the union in an action alleging a breach of its duty of fair representation. *See* Appendix 6a.

Petitioner filed a timely petition for certification with the Supreme Court of New Jersey, which denied certification on September 9, 1985.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING ISSUES CONCERNING THE APPLICATION OF FEDERAL LABOR LAW AND POLICY AND DEMONSTRATES THE CRITICAL NEED FOR CLEAR AND CONSISTENT SUPREME COURT GUIDANCE IN THIS AREA.

This case raises several important issues concerning the application of federal labor policies and statutes. This Court has repeatedly asserted that "the subject matter of § 301 [29 U.S.C. § 185] is 'peculiarly one that calls for uniform law' ", *Del Costello v. Teamsters*, 462 U.S. 151, 162, *quoting Auto Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696, 701 (1966) and *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103 (1962). These issues have never been directly addressed by this Court and the lower courts have failed to evolve a consistent approach in applying well-established legal principles to new factual situations.

The decision below, rendered by a New Jersey state appellate court, conflicts in principle with several federal court decisions. The federal courts have issued opinions on these or related issues which are also inconsistent. This Court's establishment of a definitive rule regarding these issues is critical because the questions involved are recurring in nature and affect millions of workers across the nation. Among the unanswered questions posed by this case are:

(1) Does an individual employee have standing to vacate an illegal arbitration award pursuant to the Labor Management Relations Act and federal labor policy when the union consents to such vacation?

Well-established federal policy favors collective negotiations

as the preferred method of handling labor-management relations.[4] This federal policy, as this Court has consistently observed, also favors arbitration as a dispute resolution mechanism. *Hoosier*, 383 U.S. at 702. Consistent with the strong preference for private dispute resolution, it is federal policy that an arbitration "award is legitimate only so long as it draws its essence from the collective bargaining agreement." *United Steelworkers v. Enterprise Corp.*, 363 U.S. 593, 597 (1960); *Johnson Bronze Co. v. Int'l Union of United Automobile Aerospace, and Agricultural Implement Workers of America*, 621 F.2d 81, 82 (3d Cir. 1980).

Although the standard for vacating an arbitration award is a stringent one, awards which are not grounded in the collective bargaining agreement of the parties, or which manifest infidelity to the contract, cannot be enforced. *United Steelworkers v. Enterprise Corp.*, 363 U.S. at 597.[5] Despite the centrality of the

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4. Declaration of purpose and policy, Labor Management Relations Act, 29 U.S.C. § 171(a).

5. The standard of review was articulated in *Brotherhood of Railroad Train v. Central of Ga. Pa. Co.*, 415 F.2d 403, 411-12 (5th Cir. 1969), *cert. denied*, 396 U.S. 100 (1970):

> *To merit judicial enforcement, an award must have a basis that is at least rationally inferable, if not obviously drawn, from the letter or purpose of the collective bargaining agreement.* The arbitrator's role is to carry out the aims of the agreement, and his role defines the scope of his authority. When he is no longer carrying out the agreement or when his position cannot be considered in any way rational, he has exceeded his jurisdiction . . . . This Court in *Safeway Stores v. American Bakery Workers Local 111*, 390 F. 2d 79, 81, 82, (5th Cir. 1968), has recently announced the standard for review of an arbitrator's award: "[I]f the award is arbitrary, capricious or not adequately grounded in the basic collective bargaining contract, it will *not* be enforced by the

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collective negotiations process in federal labor policy, this Court has on several occasions reaffirmed that an individual employee may, in certain circumstances, bring an action to vindicate individual employee rights arising from a collective bargaining contract. *Smith v. Evening News Assn,* 371 U.S. 195, 200 (1962); *Del Costello,* 462 U.S. at 163. In *Smith,* this Court held that the claims of individual employees are central to the grievance and collective bargaining process, and to give voice to these claims is to advance federal labor policies:

> Individual claims lie at the heart of the grievance and arbitration machinery, are to a large degree intertwined with union interests and many times precipitate grave questions concerning the interpretation and enforceability of the collective bargaining contract on which they are based. To exclude these claims from the ambit of § 301 would stultify the congressional policy of having the administration of collective bargaining contracts accomplished under a uniform body of federal substantive law. This we are unwilling to do.

371 U.S. at 200.

Obviously, a natural tension exists between these several goals of federal labor policy. In considering the issue of whether individual employees have standing to enforce collective bargaining agreements the lower courts have struggled, with inconsistent results, to balance these competing considerations. While some

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(Cont'd)

> court . . . . On its face the award should ordinarily reveal that it finds its source in the contract and those circumstances out of which comes the 'common law of the shop'." [Emphasis supplied].

courts have found standing under § 301 for individual employee suits against employers, most continue to insist on a "hybrid" breach of contract-duty of fair representation suit in order to establish jurisdiction under § 301.[6] Others have determined that individual employees have standing to confirm, but not to challenge, arbitration awards.[7]

The Court of Appeals for the Seventh Circuit, for example, has followed a liberal approach to the question of standing under § 301. In *F.W. Woolworth v. Miscellaneous Warehousemen's Union, Local 781,* 629 F.2d 1204 (1980), the district court had vacated an arbitration award which ordered the reinstatement of certain employees. The union decided not to appeal from that decision. The court of appeals allowed the individual employees to intervene in order to appeal from the district court decision. The court cautioned against rigid, mechanistic rules in this area:

> The issues presented in the instant case should be governed by flexible, pragmatic and, above all, just, procedural principles, not by some suffocating rule that unions may, under any imaginable circumstances, be the only party opposing the employer in proceedings involving the construction of collective bargaining agreements.[4] Any

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6. *See, e.g., Samples v. Ryder Truck, Inc.*, 755 F. 2d 881 (11th Cir. 1985); *Andrus v. Convoy Co.*, 480 F. 2d 604 (9th Cir. 1973); *Harris v. Chemical Leaman Tank Lines, Inc.*, 437 F. 2d 167 (5th Cir. 1971).

7. *See, e.g, Santos v. United Brotherhood of Carpenters and Joiners*, 547 F. 2d 197 (2d Cir. 1977); *Hadaway v. Mountainside Transport*, 104 LRRM 2279 (D. Ma. 1980).

One District Court Judge in New Jersey has also adopted such an analysis in *dicta. Adams v. Compton Knowles Corp.*, 587 F. Supp. 561 (D. N.J. 1982).

> argument that the contractual function of the union in deciding which grievances should be pursued would be undermined by allowing these employees to take this appeal is quite specious. The function of the union has been perfected by its winning of the arbitration (which it subsequently supported). So long as the employees intervene in support of the award and without the opposition—formal or informal—of the union, they are merely complementing the activities of the union and seeking to vindicate the purposes for which the union undertook their representation in the first place.
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> [4]We note that a similar flexible approach was used by the Supreme Court in *Trbovich v. United Mine Workers*, 404 U.S. 528, 92 S.Ct. 630, 30 L.Ed.2d 686 (1972). In *Trbovich* the Court allowed an individual to intervene in a suit brought by the Secretary of Labor under U.S.C. Sec. 482(b), after determining that his intervention would not contravene any of the policies of the LMRDA or unduly burden the Secretary or the union.

629 F.2d at 1212.

While the Court in *Woolworth* distinguished between actions to confirm and actions to vacate arbitration awards, *id.* at 1212, the approach taken and the policies discussed are directly applicable to the issues herein. In *Woolworth*, the Court found lack of union opposition to the employee's court action to be a critical factor in rejecting the employer's argument that the grant of standing would thwart the collective bargaining process. The Court stated:

> Here we have a situation where the grievance procedure has culminated in an arbitration award, which Woolworth has sought to vacate through

> an action under Sec. 301(a) of the LMRA. The Union has opposed Woolworth's efforts in the district court. The record is bereft of any evidence that, in failing to prosecute an appeal from the order of the district court setting aside the award, the Union is seeking to carry out any collective bargaining policy or strategy. In evincing no objection to the actions of the putative intervenors, the Union at the very least has indicated indifference to the pursuit of the appeal, as well as to the result reached on appeal (although we must presume that the Union would prefer its position in the district court to be vindicated on appeal.)

629 F.2d at 1210.

As in *Woolworth,* petitioner herein availed himself of the grievance-arbitration procedure in the contract, and brought his action with the consent of his union. Thus petitioner's action in no way circumvents or contravenes the collective negotiations system which federal labor policy supports, nor the public policy favoring private dispute resolution mechanisms. Rather, because the arbitrator's award did not draw its essence from the collective bargaining agreement, recognizing petitioner's standing to vacate the arbitrator's award under the circumstances of this case supports these policies. Nevertheless, the New Jersey Appellate Division held that petitioner did not have standing to commence such an action, relying in part on a state arbitration statute limiting vacation actions to "parties" to the arbitration.

Other federal courts have found that individuals have standing under § 301 by interpreting the term "party" to the collective bargaining agreement in significantly less restrictive terms than

the interpretation applied in this case. For example, in *Santos v. United Brotherhood of Carpenters and Joiners*, 547 F.2d at 200, the Court of Appeals for the Second Circuit found that individual members of one union had standing to enforce an arbitration award against another union. The court held that even though the employees were not signatories to the agreement, their job loss was a tangible harm fulfilling the requirement of a demonstrable, particularized injury as articulated by this Court in *Warth v. Seldin*, 422 U.S. 490, 517-18 (1975).

A recent district court opinion, employing similar reasoning, has held that

> a section 301 suit may be properly maintained by persons other than the parties to the labor agreement, including individuals who are not employees of the employer-party, provided that the individuals who sue have a personal and beneficial interest in the enforcement of such agreement, and said interest is injured by a breach thereof.

Williams v. AMF, Inc., 512 F. Supp. 1048 (S.D. Ohio 1981), *citing Hill v. Iron Workers Local Union 25*, 520 F.2d 40 (6th Cir. 1975); *Hazen v. Western Union Telegraph Co.*, 518 F.2d 766 (6th Cir. 1975).[8] The *Williams* decision is illustrative of the current dilemma facing many lower courts seeking to apply federal labor law in this area. On the one hand, the courts are heedful of this Court's decision in *Vaca v. Sipes*, 386 U.S. 171 (1967), concerning the primacy of the union's role in representing employees in the

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8. In *Hazen*, the Court of Appeals for the Sixth Circuit permitted an employee's widow to sue under § 301 to enforce a collective bargaining agreement on her deceased husband's behalf, without naming the union in a fair representation suit. 518 F. 2d at 769.

grievance-arbitration process. On the other hand, the individual employee has certain "uniquely personal rights" which should be enforceable under federal labor laws. *Smith v. Evening News Ass'n*, 371 U.S. at 198.

In *Williams v. AMF, Inc.*, the union arbitrated the employees' grievance and won a back pay award. The company, however, refused to pay the back wages to the employees, and the union negotiated a settlement with the company wherein the company was to pay some, but not all, of the wages awarded by the arbitrator. The employees thereupon filed suit under § 301 to enforce the original award. The union was not joined as a party defendant (no claim of the breach of duty of fair representation was made) or as a party plaintiff in the confirmation and enforcement action. The court held that the employees had standing under § 301 to initiate an action against the employer. It rejected as "quite imaginative" the company's proposition that *Vaca* requires naming the union in a duty of fair representation case as a "condition precedent" to a § 301 suit against the employer. 512 F. Supp. at 1056.

In the case at bar there is no allegation that the union breached its duty of fair representation. There are many practical reasons why a union in good faith will not pursue an individual's claim against an employer in court, even though the union pursued contractual remedies and supports the employee in resultant litigation. Fairness dictates that such an employee be granted standing to enforce rights as basic and fundamental as those arising under an employment contract.[9] If the union consents to its

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9. The right to employment has long been considered of fundamental importance in the State of New Jersey (" . . .the right to obtain gainful employment and to use the fruits of such labor to acquire property has traditionally been considered basic." *Peper v. Princeton Bd. of Trustees*, 77 N.J. 55, 77 (1978).

affected member bringing an action to vacate such an award, and the employee has exhausted the grievance and arbitration remedies provided in the collective bargaining agreement, as required by *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965), his action works to support, not undermine, the integrity of those remedies.

The fact that an employee seeks to vacate rather than confirm an award is immaterial. Indeed, distinguishing between suits brought to confirm arbitration awards and suits brought to vacate them may, as in the case at bar, threaten the very collective bargaining policies the courts seek to protect. Limiting standing to those individuals seeking to confirm awards does not necessarily promote enforcement of the *contract*. In fact, in cases where the arbitrator's award does not draw its essence from the collective bargaining agreement, vacation of the award is necessary in order to enforce the contract. It is manifestly unjust to prohibit an employee, whose union declines court action to vacate an illegal award, from enforcing the contract with the union's consent. Thus, imposing a technical bar to employee vacation actions in the name of fidelity to the collective bargaining process in fact subverts that process.

This Court has recently recognized the need to look at these issues pragmatically:

> . . . in this court's fashioning of a federal law of collective bargaining, it is of the utmost importance that the law reflect the realities of the collective bargaining process.

Del Costello, 462 U.S. at 172, *quoting from Humphrey v. Moore*, 375 U.S. 335, 358 (1964). The facts in this case clearly illustrate those realities. Granting standing to petitioner not only promotes a just and equitable result in this case, it establishes a uniform rule consistent with long-standing federal labor policy. Such

uniformity is essential because these issues are recurring and affect millions of workers across the Nation.

(2) What limitations period is applicable to an action to vacate an arbitration award brought by an individual employee under § 301 of the Labor Management Relations Act?

If this Court determines that individual employees may maintain actions to vacate arbitration awards pursuant to § 301, then it must also consider the appropriate limitations period to apply to such an action.[10] The decision below directly conflicts with this Court's decision and reasoning in *Del Costello*, which established a uniform six-month limitations period, borrowed from § 10(b) of the National Labor Relations Act, for an action to vacate an arbitration award, where the employee also alleges the union's violation of its duty of fair representation. Although the Court reached this conclusion in part based on the nature of the employee's fair representation claim, the reasoning is no less persuasive in a "straightforward" § 301 employee vacation action.

The circumstances presented by the case at bar have never previously come directly before this Court, although on several occasions, this Court has expressed a view as to the appropriate resolution of the problem. In *Hoosier*, 383 U.S. 696, the Court addressed the question of what limitations period to apply to a § 301 action brought by a union against an employer. The Court adopted the usual rule that closely analogous state limitations statutes should apply, but noted that it did not indicate any view as to whether "other § 301 suits different from the present one might call for the application of other rules on timeliness", 383

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10. The question of whether the running of the limitations period should be tolled is not raised unless the Court determines that a six-month limitations period should *not* apply to employee § 301 actions such as this case, and therefore is not addressed at this time.

U.S. at 705, fn.7. *See also, Del Costello*, 462 U.S. at 163.

In *United Parcel Service v. Mitchell*, 451 U.S. 56 (1981), this Court decided which of two state limitations periods should apply to an employee § 301 action against an employer and the union. The Court specifically limited its decision, and did not address the question of whether the federal six-month limitations period of § 10(b) of the NLRA was applicable, since that issue had not been raised below or on appeal to the court by either party. 451 U.S. at 60, n.2.[11] In his concurring opinion, however, Justice Stewart argued for the uniform application of the § 10(b) limitations period to § 301 actions brought by employees.

Justice Stewart's opinion provides cogent analysis in support of a uniform limitations period. Reasoning that the six-month limitations period of § 10(b) reflects Congress' view "as to the proper balance between the national interests in stable bargaining relationships and finality of private settlements, and an employee's interest in setting aside what he views as an unjust settlement under the collective-bargaining system," Justice Stewart counseled for the adoption of the federal limitations period. 451 U.S. at 70-71. Although *Mitchell* was a hybrid action against both the employer and the union, Justice Stewart concluded that even if the suit were a "pure" employee § 301 action, the six-month limit of § 10(b) should apply:

> Finally, even if it were appropriate to view the respondent employee's suit in this case as founded solely on § 301, the Court is not obliged to apply a state statute of limitations. As already noted,

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11. The issue *was* raised by *amicus* the American Federation of Labor and Congress of Industrial Organizations. The Court stated: "Our grant of *certiorari* was to consider *which* state limitations period should be borrowed, not whether such borrowing was appropriate. *Id.* at 60, fn. 2.

Hoosier contemplated that "other § 301 suits different from the present one might call for application of other rules of timeliness." 383 U.S. at 705, n.7. And the Court has indicated, in a more general context, that state limitations periods will not be applied when their employment would be inconsistent with national policy:

> "[T]he Court has not mechanically applied a state statute of limitations simply because a limitations period is absent from the federal statute. State legislatures do not devise their limitations periods with national interests in mind, and it is the duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies . . . .
>
> State limitations periods will not be borrowed if their application would be inconsistent with the underlying policies of the federal statute." *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 367.

451 U.S. at 69-70.

In *Del Costello*, this Court substantially adopted Justice Stewart's reasoning in articulating why, in some circumstances, "state statutes of limitations can be unsatisfactory vehicles for the enforcement of federal law." 462 U.S. at 161. The Court concluded that the three-month limitations period established for vacation actions in the New York arbitration law was designed for commercial transactions, not employee actions against an employer or union. It explicitly rejected the *Mitchell* decision's appropriation of state limitations periods for vacating arbitration

awards, applying instead the six-month limitations period of § 10(b) of the NLRA:

> In *Mitchell*, we analogized the employee's claim against the employer to an action to vacate an arbitration award . . . Nevertheless, the parallel is imperfect in operation. The main difference is that a party to a commercial arbitration will ordinarily be represented by counsel or, at least, will have some experience in matters of commercial dealings and contract negotiation . . . Moreover, an action to vacate a commercial arbitral award will rarely raise any issues not already presented and contested in the arbitration proceeding itself. In the labor setting, by contrast, the employee will often be unsophisticated in collective bargaining matters, and he will almost always be represented solely by the union. He is called upon, within the limitations period, to evaluate the adequacy of the union's representation, to retain counsel, to investigate substantial matters that were not at issue in the arbitration proceeding, and to frame his suit. Yet state arbitration statutes typically provide very short times in which to sue for vacation of arbitration awards. Concededly, the very brevity of New York's 90 day arbitration limitation period was a major factor why, in *Mitchell*, we preferred it to the six year statute for breach of contract; but it does not follow that because six years is too long, 90 days is long enough. We conclude that state limitations periods for vacating arbitration awards fail to provide an aggrieved employee with a satisfactory opportunity to vindicate his rights under § 301 . . . .

462 U.S. at 165-166.

In the decision below, the New Jersey Superior Court, Appellate Division invoked this Court's decision in *Mitchell*, rather that the more recent and relevant decision in *Del Costello*, to establish the limitations period for petitioner's action to vacate the arbitration award, and applied a ninety (90) day limitations period derived from New Jersey's arbitration act. This decision conflicts with the reasoning in *Del Costello* and subverts the federal interest in uniform and consistent application of federal labor laws.

The fact that petitioner has not joined his § 301 action against the employer with an action against his union for violating the duty of fair representation is irrelevant. Nearly all of the factors cited by this Court in *Del Costello*—the employee's lack of sophistication in collective bargaining matters, the fact that he or she will almost always be represented in such matters by the union, the need for the employee, in a limited period of time, to retain counsel, investigate substantial matters not previously at issue and frame his suit—are also present in petitioner's case. Additionally, in this particular context, petitioner needed to obtain the approval of his union before bringing this action.

As this Court has stated repeatedly, the need for uniformity in federal labor law is most apparent when the grievance-arbitration process is itself implicated. In such circumstances, reliance on state law principles, even nominally "procedural" principles such as the application of limitations periods, can interfere with the functioning of federal labor laws. As this Court stated in *Teamsters v. Lucas Flour Co.*:

> . . .The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace. State law

> which frustrates the effort of Congress to stimulate the smooth functioning of that process thus strikes at the very core of federal labor policy.

369 U.S. at 103-104.

This Court should grant petitioner's writ of certiorari in order to resolve current uncertainty as to the appropriate limitations period to be applied to "straightforward" § 301 actions brought by individual employees to vacate arbitration awards.

CONCLUSION

For the foregoing reasons a writ of certiorari should issue to review the judgment and opinion of the New Jersey Superior Court, Appellate Division.

Respectfully submitted,

NANCY ERIKA SMITH
SHARON ANGLIN TREAT

BALL, KIERNAN,
LIVINGSTON and SMITH
Attorneys for Petitioner

Dated: December 5, 1985

APPENDIX A—ORDER DENYING PETITION FOR CERTIFICATION, SUPREME COURT OF NEW JERSEY (SEPTEMBER 9, 1985)

SUPREME COURT OF NEW JERSEY

C-23 SEPTEMBER TERM 1985

24,073

JOSEPH GISSARO,

Plaintiff-Petitioner,

vs.

GROSS & HECHT TRUCKING, INC.

Defendant-Respondent.

ON PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-4912-83T3 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 5th day of September 1985.

Appendix A

s/ Stephen W. Townsend
CLERK OF THE
SUPREME COURT

A TRUE COPY
Stephen W. Townsend, Clerk

Filed September 9, 1985

APPENDIX B—DECISION AND JUDGMENT OF THE SUPERIOR COURT, APPELLATE DIVISION (APRIL 29, 1985)

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-4912-83T3

JOSEPH GISSARO,

Plaintiff-Appellant Cross-Respondent,

and

LOCAL 807, INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Plaintiff,

v.

GROSS AND HECHT TRUCKING, INC.,

Defendant-Respondent-Cross-Appellant.

Submitted April 16, 1985—Decided APR 29 1985

Before Judges J.H. Coleman and Simpson.

On appeal from the Superior Court, Chancery Division, Somerset County.

Ball, Hayden, Kiernan, Livingston & Smith, attorneys for plaintiff Joseph Gissaro (Nancy Erika

Appendix B

Smith, on the brief; David Tykulsker, on the reply brief).

Yauch, Peterpaul & Clark, attorneys for defendant (Frank J. Peterpaul, on the brief).

PER CURIAM

Plaintiff, Joseph Gissaro (Grievant), a member of Local 807, International Brotherhood of Teamsters (Union), appeals from the dismissal of an action brought by Gissaro and the Union to vacate an arbitrator's award in favor of defendant. The asserted bases for vacation of the decision were *N.J.S.A.* 2A:24-8a, b, and d. The trial judge dismissed as to the Union because the action was not commenced within 3 months of the award as required by *N.J.S.A.* 2A:24-7 and dismissed as to Gennaro as "without standing to bring this cause of action". She held, however, that the time bar of *N.J.S.A.* 2A:24-7 did not apply to Gissaro because of an "odd set of circumstances" and if he had "standing to maintain such an action, he should be considered as within time." Defendant, Cross and Hecht Trucking, Inc. (Employer) cross-appeals from the latter ruling and asserts that the time bar is applicable to Gissaro also. The Union has not appealed at all. We affirm as to the dismissal against Gissaro and the Union and reverse as to the cross-appeal by the employer—thus reaching the same result as Judge Long, but for additional reasons.

The arbitration hearing was adjourned from May 9, 1983 to May 26, 1983 to accommodate Gissaro. The arbitrator heard a number of witneses, including the grievant, and rendered the following decision on July 7, 1983:

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> The undersigned has reviewed the evidence and testimony given in this hearing and is persuaded that the Company has demonstrated that the grievant is guilty of grave misconduct in his employment. By his activity he abandoned his job and constructively quit.
>
> Therefore, I rule the Company had just cause to notify the grievant that he voluntarily quit his job and drop him from its employ.

The details of the grievance are unnecessary to a determination of this appeal and cross-appeal, but our review of the record reveals no substantiation of the assertions that the arbitrator's award should be vacated pursuant to the cited subsections of *N.J.S.A.* 2A:24-8. The award was mailed to the Union, the Employer, and the Union's attorney on July 7, 1983. The effective filing date of this action was December 14, 1983 or more than 5 months after the award and obviously beyond the 3 month's limitation of *N.J.S.A.* 2A:24-7. Gisarro asserted difficulty in obtaining a copy of the award (without specifying the details), but his attorney received a copy on September 16, 1983. Since Gissaro's attorney still had until October 7, 1983 to file within time (3 months after July 7, 1983), the Grievant as well as the Union missed the statutory deadline of *N.J.S.A.* 2A:24-7. Grievant's suggested equitable tolling of the time bar because "a relatively common lack of promptness may be caused by inadvertence, vacations, mechanical error or any of a number of perfectly understandable reasons well-known to anyone who has worked in an office" is unpersuasive.

Although apparently not raised below, grievant now cites *DelCostello v. Teamsters,* ____ U.S. ____, 76 *L. Ed.* 2d 476, ____

S. Ct. ____ (1983) as establishing a 6 months limitation period for this type of case. The reliance is misplaced, since such period is only applicable to suits by an employee against an employer *and* a union "alleging that the employer had breached a provision of a collective bargaining agreement, and that the union had breached its duty of fair representation by mishandling the ensuing grievance-and-arbitration proceedings." 76 *L. Ed.* 2d at 482. Gisarro makes no such claim against Local 807 in this case, so the usual rule of *United Parcel Service v. Mitchell*, 451 *U.S.* 56, 67 *L.Ed.* 2d 732, 101 *S. Ct.* 1559 (1981) would be applicable even assuming a federal rule was applicable to this action. The rule of *Mitchell* is that in the case of an employee's claim against an employer the state statute of limitations for vacation of an arbitrarion award governs. Thus the 3 month time bar of *N.J.S.A.* 2A:24-7 precludes both Gisarro and the Union under the facts of this case. A further claim that there should be "equitable tolling" of the time bar, citing *Lopez v. Swyer*, 62 *N.J.* 267 (1973) and other "discovery rule" cases, also fails. Gisarro was present at the arbitration hearing, any delay in his receiving a copy of the award decision was the fault of himself or the union, and his attorney actually had a copy 3 weeks before the 3 month period expired.

Aside from the time bar, it is clear that Gisarro did not have standing to commence this action to vacate the arbitrator's award—and that is doubtless the reason the Union was also named as plaintiff in the action. It is undisputed that the parties to the collective bargaining agreement were the union and the employer and that only they could ultimately invoke binding arbitration in a discharge case. Although New Jersey has a liberal approach to standing generally, *Crescent Park Tenants Ass'n v. Realty Eq. Corp. of N.Y.*, 58 *N.J.* 98, 101 (1971), *N.J.S.A.* 2A:24-7 is clear

in providing that "[a] *party* to the arbitration may . . . commence an action [to vacate an award . . .]" (emphasis supplied). No Federal or New Jersey cases, cited or located in our research, extend standing to commence such an action to a union member except where there is an alleged breach of duty of fair representation by the union. See generally, *Saginario v. Attorney General*, 87 *N.J.* 480 (1981); *Vaca v. Sipes*, 386 *U.S.* 171, 87 *S. Ct.* 903, 17 *L. Ed.* 2d 842 (1967).

In sum, we hold that, pursuant to *N.J.S.A.* 2A:24-7, Gisarro did not have standing to commence the action below and that both he and the Union were precluded by the 3 month time bar of that statute.

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.
s/ Elizabeth McLaughlin, Clerk

APPENDIX C—ORDER DISMISSING COMPLAINT, SUPERIOR COURT, CHANCERY DIVISON (MAY 8, 1984)

YAUCH, PETERPAUL & CLARK, P.A.
One Cleveland Place
Springfield, N.J. 07081
(201) 467-8855
Attorneys for Defendant

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
SOMERSET COUNTY

Docket No.: C 5377-83E

CIVIL ACTION

Plaintiffs

JOSEPH GISSARO, Individually, and LOCAL 807, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

vs.

Defendant

GROSS AND HECHT TRUCKING, INC.

ORDER DISMISSING COMPLAINT

Plaintiffs Joseph Gissaro, individually, and Local 807, International Brotherhood of Teamsters, through their Attorneys Ball, Hayden, Kiernan & Livingston, Esqs., Nancy Erika Smith, Esq., appearing, having filed a Verified Complaint, Affidavit and

Appendix C

Order to Show Cause with supporting brief pursuant to N.J.S.A. 2A:24-7 and R.4:67-1, *et. seq.*; and

Defendant, Gross and Hecht Trucking, Inc., through its attorneys, Yauch, Peterpaul & Clark, Esqs., Frank J. Peterpaul, Esq., appearing, having filed its Verified Answer, Affidavits and Brief, pleading *inter alia* that this action was not commenced by plaintiffs within the time prescribed by N.J.S.A. 2A:24-7 and that plaintiff, Joseph Gissaro, individually, is not a proper party to bring this cause of action; and

This Court having considered the pleadings, Affidavits and Briefs filed in this action, and the arguments of the respective attorneys in support of and in opposition to the Order to Show Cause; and

This Court having found that such pleadings, Affidavits, Briefs and arguments show palpably that there is no genuine issue as to any material fact; and

This Court having found that the plaintiff, Local 807, International Brotherhood of Teamsters did not commence this action within the time period prescribed by N.J.S.A. 2A:24-7; and

This Court having determined that plaintiff, Joseph Gissaro, individually, is without standing to bring this cause of action;

IT IS ON THIS 7th day of May, 1984, ordered that the Order to Show Cause heretofore entered in this matter be and the same hereby is discharged; and that judgment be and the same hereby is entered in favor of the defendant, Gross & Hecht, and against the plaintiffs, Local 807, International Brotherhood of Teamsters and Joseph Gissaro, individually, based on the failure of plaintiff

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Local 807, International Brotherhood of Teamsters, to commence the within action within the time period prescribed by N.J.S.A. 2A:24-7, and based on plaintiff Joseph Gissaro's lack of proper standing to bring this action individually.

s/ Virginia Long

VIRGINIA A. LONG J.S.C.

APPENDIX D—TRANSCRIPT OF ORAL DECISION, SUPERIOR COURT, CHANCERY DIVISION (APRIL 25, 1984)

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION—MERCER COUNTY
DOCKET NO. C-5377-83E

JOSEPH GISSARO, et al.,

Plaintiffs,

vs.

GROSS & HECHT TRUCKING,

Defendant,

STENOGRAPHIC TRANSCRIPT OF DECISION
(TELEPHONE CONFERENCE)

Place: Mercer County Courthouse
Trenton, New Jersey

Date: April 25, 1984

BEFORE: HON. VIRGINIA A. LONG, JSC

TRANSCRIPT ORDERED BY:

FRANK J. PETERPAUL and NANCY E. SMITH

APPEARANCES:

BALL, HAYDEN, KIERNAN and
LIVINGSTON, ESQS.
BY: NANCY ERIKA SMITH, ESQ.
Attorneys for the Plaintiffs.

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YAUCH, PETERPAUL & CLARK, ESQS.
BY: FRANK J. PETERPAUL, ESQ.
Attorneys for the Defendant.

Marian V. Walsh, CSR
Mercer County Courthouse
Trenton, New Jersey 08650

[2] THE COURT: Counsel, will you state your appearances for the record.

MS. SMITH. Nancy Smith for the plaintiff.

MR. PETERPAUL: Frank J. Peterpaul for the defendant.

THE COURT: As I indicated or Jackie indicated to you last week, I was ruling in favor of the defendant in this matter. We had asked if either party wanted a statement of reasons for the record, and that's what we're all about today.

The preliminary issue in this case was procedural. That is, while there was no question but that under Lucas Flour and Lincoln Mills, Lucas Flour at 369 U.S. 95 (1962) and Lincoln Mills, 353 U.S. 448 (1957), federal substantive law applies to such a case as this.

State procedural law applies under the reasoning of Heavener vs. Uniroyal, 63 N.J. 130 and Marshall vs. George M. Brewster, 37 N.J. 176.

Appendix D

We have a statute of limitations issue in this case, that is, the timeliness of a 301 suit which has to be determined under federal law by reference to the appropriate State Statute of Limitations under United Parcel Service vs. [3] Mitchell, and that's 451 U.S. 56.

Our State Statute of Limitations is N.J.S.A. 2A:24-7 which gives us a 90-day tolling period for the actions with respect to arbitration.

Now, in this case, the award was delivered to the defendant and to the union sometime in July, and clearly, there was no action by either of those parties with respect to the arbitrator's award within the time prescribed by our statute. Joseph Gessaro, who is the individual whose job, in fact, was the issue in this case, says he was personally unable to obtain a copy of the award until September 28th and then only as a result of hiring his own attorney. This action was filed on or before December 28th. Clearly, if Gessaro has independent standing to maintain such an action, he should be considered as within time.

While there was argument here by the company that the service upon the union and the union's attorney should have been enough, I am satisfied that the odd set of circumstances which required Gessaro to hire his own lawyer just to see a copy of the arbitrator's award would in a case in which Gessaro had standing have been sufficient to establish or to find that he was within [4] time by

filing prior to December 28th. The question is whether he does have the independent standing to maintain this action.

It's well settled that New Jersey cases have historically taken a much more liberal approach on the issue of standing than of federal cases. Crescent Park Tenants Association vs. Realty Equity Corp. of New Jersey, 58 N.J. 98 (1971), reaffirmed that liberal approach to standing by our courts. Gessaro, as an employee who has lost his job, is not a stranger or an intermeddler in this action, but has an important stake in the outcome of the action. And if no countervailing legal or policy arguments were advanced, independent standing would likely have been found in this case.

I believe that there are other aspects, however, which mitigate against such a finding.

N.J.S.A. 2A:24-7 provides:

"A party to the arbitration may commence a summary action for its vacation."

And N.J.S.A. 2A:24-2 establishes a party as one of "two or more parties who by their agreement in writing" submit a controversy to arbitration.

[5] Here the actual parties to this submission are the employer and the union and not Gessaro himself. And this is in accordance with Article 46, par. 1 of the Collective Bargaining Agreement

which provides that only the employer and the union may invoke the grievance procedure and in a case involving discharge, binding arbitration.

On the basis of this statutory scheme and the Collective Bargaining Agreement, the defendant has concluded that the plaintiff has no standing, and if, in furtherance of its conclusions, the defendant draws the Court's attention to Soto vs. Goldman which is reported at 7 N.Y. 2d, 397. That's a 1960 case. And the Goldman court held, and I quote:

"The award, having been rendered in a controversy between the parties to a valid collective agreement, could be vacated only at the initiation of a party to the arbitration in the manner and for the reasons provided by section 1462 of the Civil Practice Act. The petitioners, not being parties to the agreement, may not avail themselves of rights which under the Civil Practice Act are limited to parties; an exception to such limitation [6] may not be created by judicial application of equitable principles nor may a basis for vacation be supplied by implication."

That's at page 173.

Now, there exists a whole host of federal cases supporting the Soto view. In Harris vs. Chemical Leaman Tank Lines Inc., 437 Fed. 2d 167 (5 CiR. 1971), the Court addressed the question of whether plaintiffs as individual employers as well as

representatives of a certain class of employees have standing to bring suit to vacate a joint labor management committee decision. Submission of grievances to such a committee was mandated by the Collective Bargaining Agreement followed up by a referral to arbitration at the request of either party. Plaintiffs contend that "The local unions breached their duty of fair representation owed to plaintiffs by refusing to take the grievances to arbitration and by refusing to bring this suit, knowing that the decision was invalid. On that basis, plaintiffs assert the right to maintain suit in their own behalf."

The Harris court held:

"Assuming that grievance procedures have been exhausted by the union, the individual grievant [7] is ordinarily bound by a resulting adverse decision which is 'final' and 'binding' on the parties to the contract." Citations are omitted.

"The union or the employer, as parties to the labor agreement, may sue to vacate a final award on the ground that the issue submitted was not arbitrable under the contract," and there's a footnote omitted, "or that the arbitrator exceeded the scope of the submission." Another footnote omitted. "Courts have not allowed an individual attack on a final award, however, except on the grounds of fraud, deceit or breach of the duty of fair representation or unless the grievance procedure was a 'sham, substantially inadequate or substantially unavailable.' "

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Furthermore, in Santos vs. District Council of New York City, 547 Fed. 2d, 197, and that's Santos I, there is a second leg of this which is reported at 619 Fed. 2d. 963 where the Court distinguished enforcement from vacation of an arbitrator's award. The Court held:

"It is well established that a person who loses in a contractually prescribed arbitration proceeding may not, absent some showing of bad faith, ask a court to determine the merits of [8] his claim." Citations are omitted. "But it is equally well established that the victor in an arbitration proceeding may seek court enforcement of his award under the Labor Management Relations Act, Section 301(a)." Citations are omitted.

"Appellants, through their union, were the victors here, and all they seek is judicial enforcement of the umpire's award." Footnote omitted. "They have not asked for judicial review of the propriety of the award."

Thus, plaintiff's reliance in the case at bar on footnote 3 at page 200 of the Santos decision which rejects the theory that "one must be a signatory to a contract in order to have standing to sue" must be reviewed in the enforcement context alone. Nowhere in the Santos decision is there any language supporting standing by individual employees when vacation of the award is at issue like in the case at bar.

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Plaintiff relies on F. W. Woolworth vs. Miscellaneous Warehouseman's Union, 629 Fed. 2d 1204 (7 Cir. 1980), cert den. 451 U.S. 937, to support its contention that the individual employees have standing to sue.

The following language was quoted by the [9] plaintiff here:

"The issues presented in this case should be governed by flexible, pragmatic and, above all, just procedural principles, not by some sufficating rule that unions may, under any imaginable circumstances, be the only party opposing the employer in proceedings involving the construction of collective bargaining agreements." Footnote omitted. "Any argument that the contractural function of the union in deciding which grievances should be pursued would be undermined by allowing these employees to take this appeal is quite specious. The function of the union has been perfected by its winning of the arbitation which it subsequently supported. So long as the employees intervene in support of the award and without the opposition—formal or informal—of the union, they are merely complementing the activities of the union and seeking to vindicate the purposes for which the union undertook their representation in the first place."

The second half of this paragraph which was quoted by the plaintiffs at length in this case, was not part of the quote which was used, and that

essentially qualifies standing to sue, [10] that is, individual standing to sue upon enforcement and not vacation of the arbitrator's award. In fact, in Woolworth at page 1210, the Court noted that the case did not involve efforts by individual employees to set aside the ultimate result of the grievance procedure, namely the arbitation award.

Such a conclusion is reinforced in United Parcel Service vs. Mitchell, 451 U.S. 56. Involved in Mitchell was a 301 action, and the alleged wrongful discharge of an employee.

The Supreme Court held that the "indispensable predicate" for action is not simply whether there existed a violation of the Collective Bargaining Agreement but, rather, "a demonstration that the union breached its duty of fair representation." Thus, Mitchell indirectly addresses and rejects the instant plaintiff's supposition that enforcement of the contract—whether it be vacation or confirmation—is the critical factor. The plaintiff's supplementary brief cites the Mitchell argument.

Finally, the New Jersey District Court in Adams vs. Compton & Knowles Corp., 115 LRRM 2903 (Nov. 10. 1982), a case in which the Collective [11] Bargaining Agreement set forth a defined grievance procedure culminating in final and binding arbitration, held:

"In the present case, the Collective Bargaining Agreement mandates that the union has the

exclusive power to enforce the rights of employees in resolution of a dispute. As such, an individual employee may not bring an action to vacate an arbitration award."

In my estimation, the case law is clear: The instant plaintiff has no individual standing to vacate an arbitration award, although if he were seeking to confirm a favorable award, a different conclusion might well have been reached here. The distinction between the confirmation and vacation is predicated upon the desire to avoid the opening of the flood gates of litigation as well as the harsh result which would accrue if an unenforceable or yet favorable arbitrable decision was not allowed to be pursued by an individual. The fact that the union here now appears to have joined the case does not change this conclusion. The union is simply out of time standing on its own, and being out of time, they cannot give weight to Gessaro which otherwise he [12] would not have or standing which he would otherwise not have. And whether under the rather unusual circumstances of this case which probably haven't occurred before and are not going to occur again, that is where the union, after dropping the ball as far as filing within the 90-day statute of limitations, now apparently concedes at this late date that Gessaro has a case which should have been pursued, whether this would be the basis for some kind of a variation on the Vaca failure of representation claim is an issue which really doesn't need to be addressed

here, but one which I think Gessaro is going to have to address himself.

After having an opportunity to review and digest this decision, the effect of what I have said, essentially, is not just that no restraints are going to be granted, but it will have the effect of dismissing the complaint in this case. So, if you'll submit an order, Mr. Peterpaul, then Ms. Smith can make a decision as her next step. Okay, thank you.

(The matter is concluded.)

(13) C E R T I F I C A T E

I, Marian V. Walsh, C.S.R., one of the Official Court reporters in and for the State of New Jersey, certify that the foregoing is a true and accurate transcript of my original stenographic notes to the best of my knowledge and ability.

s/ Marian V. Walsh

Dated: May 8, 1984

APPENDIX E - ARBITRATOR'S AWARD (JULY 7, 1983)

Local 807

vs.

Gross & Hecht Trucking Inc.

In the matter of Joseph Gissaro

This is a case of arbitration between Local 807, 32-43 49 St. Long Island City hereinafter termed "Union" and Gross & Hecht Trucking Inc., 46-02 5th Street, Long Island City hereinafter termed "Company".

Hearing was held before Hugh E. Sheridan, Impartial Chairman of New York City Trucking Authority, 30 Vesey St. New York City on March 2, 1983.

The Union was represented James J. Murray, Attorney; Joseph Marino, Business Agent; Joseph Gissaro, Grievant.

The Company was represented by Frank Scotto, Exec. Director, N.Y.S.M.T.A.; Eugene Rezach, Vice-President; George Murphy, Dir. of Maintenance.

Appearances:

Date: May 9, 1983

For the Union: James J. Murray, Attorney; Joseph Marino, Business Agent; The grievant did not appear.

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For the Company: Frank Scotto, Exec. Director, N.Y.S.M.T.A.; Eugene Rezach, Vice-President; George Murphy, Dir. of Maintenance; Sid Becker, Brian J. Kelly, Leo M. McCabe, John N. Albert, Witnesses.

Appearances:

Date: May 26, 1983

For the Union: James J. Murray, Attorney; Joseph Marino, Business Agent; Mario Adorno, Shop Steward; Robert Podesta, Michael Colorundo, Witnesses.

For the Company: Frank Scotto, Exec. Director, N.Y.S.M.T.A.; Eugene Rezach, Vice-President; George Murphy, Fleet Director; Sid Becker, Brian J. Kelly, Leo M. McCabe, John N. Albert, Witnesses. Public Stenographer, Robert Bloom.

It is undisputed that the Union and the Company are parties to a labor agreement presently in full force and effect and were so at the time the controversy arose.

The nature of the controversy and facts material to the issue are stated herein.

On March 2, 1983 the parties convened here in response to our notice of arbitration which was requested by the Union.

The attorney for the Union said the parties are going to file this issue with the Joint Area Panel. The reason for this is because the issue is characterized as a voluntary quit.

The representative of the Company said the contract provides

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that in cases of voluntary quit or involuntary quit the parties can go to the New York City Joint Local Committee first and, if they are deadlocked, the case comes here for final and binding adjudication. The parties agree to take the first step. Under this new machinery, if both parties agree to waive the first step, they can go to the second step.

The meeting was adjourned to await the outcome of the hearing before the New York City Joint Local Committee (hereinafter referred to as Panel).

On May 9, 1983 the parties convened here after the Union requested arbitration.

The Company representative said the parties appeared before the Panel and presented testimony and evidence. The Panel deadlocked. The Company is now ready to go forward with its witnesses and the presentation of its evidence.

The Union representative said the grievant is not here at this time. Based on the circumstances of this case, he asked that this matter be put over to another date. The grievant was sent a notice for today but there is no guarantee he received the letter.

The Company representative objected to any further delay as the Company has brought all these witnesses here today at great expense. If it is decided to put this matter over to another date, the Company requests that its liability be cut off as of today.

The Impartial Chairman said he wanted to give the grievant an opportunity to be present at the hearing of this matter. He rescheduled this matter for hearing on May 26, 1983 at 10:30 a.m. in this office.

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All the parties agreed to be present at the appointed time and ready to go forward.

When the Impartial Chairman entered the hearing room, he inquired who the man was sitting at his right with a reporter's machine. Robert Bloom introduced himself and said he is a public stenographer, brought here at the invitation and in the pay of the grievant. The Impartial Chairman told the grievant that the reporter would have to leave unless he was supplied with a copy of the reporter's record. The grievant agreed to have a copy of the reporter's record supplied to the Impartial Chairman.

The Impartial Chairman explained that he was not required to keep or make a record of these proceedings under the Rules and Regulations of the New York City Trucking Authority. This is left entirely to his discretion.

The Company representative said if the reporter is going to be permitted to stay, he objects to the grievant having a recording device in front of him recording the voice of everyone. He requested that the recording device be excluded from the hearing room.

The Impartial Chairman directed the grievant to put the recording device outside the room. He further directed that all of the witnesses, except one Company office, the Union's business representative and anyone not going to testify to leave the room.

Mr. Murray, by way of a preliminary statement, introduced the Company's telegram to the grievant dated January 12, 1983 for failure of the grievant to appear for work on January 10, 1983. A copy of said telegram is appended hereto and made a

part hereof, marked U-1. Mr. Murray requested that the evidence presented by limited to this date.

Mr. Scotto referred to Article 46, Sec. 1(a) of the contract and said the grievant, by his actions, has conducted himself in such a way as to have constructively quit his job. This case is not here under Article 47 but under Article 46, voluntary quit.

Mr. Murray did not agree that there was a voluntary quit. By a plain reading of the telegram there was a discharge and that comes under Article 47 which requires written warning notices. There were no written warning notices.

Mr. Rezach identified the report from D.B. Kelly Associates, a security service employed by the Company. A copy of said report is appended hereto and made a part hereof, marked C-1. The report speaks for itself. The surveillance was initiated after the Company had been receiving complaints from Pepsi that the work was not being done on the trucks and materials were missing. He prepared his own report from a conversation he had with Murphy, Fleet Director. A copy of said report is appended hereto and made a part hereof, marked C-2. The grievant's working hours in January 1983 was 3:30 p.m. to 12:30 a.m. Previously, that is before his assignment to Brooklyn, the grievant worked in Long Island City about 3½ years. A notice to all mechanics was posted on the bulletin board by the time clock. These rules applied to all employees. A copy of said rules are appended hereto and made a part hereof, marked C-3. Rezach did not know of the surveillance until January 11, 1983. The mechanics in the garage answer the phones. Murphy is the grievant's boss. Murphy does not report to him. The grievant filed for unemployment benefits. A copy of the notice of determination, disqualification, notice of another

hearing and decision are appended hereto and made a part hereof, marked C-4.

Mr. Sid Becker said he is the lead mechanic for Newport Trucking.

The Union business agent interrupted Mr. Becker's testimony stating that he wanted to apprise him of the Union's Bylaws relative to testifying against a union brother. In the presence of the grievant the Union business agent explained to Mr. Becker that he may be brought before the Executive Board on charges and could be expelled from the Union.

Mr. Scotto vehemently objected that such explanation was given in the presence of the grievant.

Mr. Becker indicated that he would not testify and was excused.

Mr. Brian J. Kelly said he works for D.B. Kelly Assoc. and used to work for the Attorney General's office in New Jersey. The report was prepared by him. His firm was contacted by Mr. Joseph Williams of the Company and asked to do a surveillance of the grievant.

Mr. John N. Albert said he works for D.B. Kelly Assoc. and participated in the surveillance of the grievant on January 6th and 7th. He has seen the report, agrees with it and would not change it. He is a full-time employee of D.B. Kelly Assoc. and was never employed by the Company. On January 6th Mr. McCabe was with him and Brian Kelly. It was a clear day. The light was normal and there were lights in their parking location and in the Pepsi building. He could look into the plant from the

street. There were 6 or 7 trucks in there. On January 7th he was with Kelly until about 9:15 p.m. Those were the only two days he was on the surveillance with Kelly. On January 6th he saw the Ford Station Wagon but can't recall any outstanding dents in it. On January 7th he did not see the grievant at all.

Mr. Leo McCabe is an employee of D.B. Kelly Assoc. and participated in the surveillance of January 6th only. He has seen the report, agrees with its contents and would not change it. When he walked around the facility, the grievant's car was not there. About 4:45 p.m. the grievant drove in and parked. At about 5 minutes to 6:00 p.m. the grievant left and the surveillance followed him. McCabe was sent back by message.

He has never worked for the Company and does not believe he was engaged by the Company before. The grievant was driving a white station wagon, Ford, which was dirty and old but he does not recall any distinguishing marks.

Mr. George Murphy is employed by Transco Group and is Director of Fleet Maintenance. He is over the grievant and was a witness at the Panel. He has seen C-2 before and knows Mario Mercurio, Director of Sales in Brooklyn. In April 1982 the grievant was assigned to Brooklyn on the second which runs from 3:30 p.m. to 12:30 a.m. He had to speak to the grievant on several occasions because Pepsi was very unhappy with his work performance. The grievant told him he was having trouble getting parts. He was told to keep a book of the parts he ordered and the dates when he ordered them. The grievant didn't keep the book or said he didn't have it with him. He was required to keep a record of all the work he peformed. He didn't do it or, when he did, it was incomplete and haphazard. For January 3rd - no reports; January 5th reports for 7 hours work; January 6th - no

reports; January 7th - no reports; January 10th - no reports, and January 11th - no reports. Copies of the reports of January 5th are appended hereto and made a part hereof, marked C-5.

On a day-to-day basis the grievant reported to Sid Becker and Becker reported to Murphy. He spoke to the grievant once on the phone and three times in person. The grievant was on his honor, on his own, working in Brooklyn. Murphy spoke to Sid Becker about the grievant's paper work in June, August, September. By the middle of December the Company was made aware of missing materials. But, before that time he was made aware that the grievant was not fixing the trucks. Mr. Williams did not discuss the surveillance with Murphy until January 10th. In December it was said that surveillance may be necessary to show the missing materials was not due to the Company's employees.

The grievant testifying in his own behalf in response to questions posed by Mr. Murray said he lives at 1555 Henry Road, not Henry Street as stated in the surveillance report.

At this point, the grievant stopped his responses to the questions posed by Mr. Murray and stood up to tell what he had to say. Notwithstanding, Mr. Murray's strenuous efforts to quiet the grievant down and get orderly responses, the grievant kept talking. He produced a letter signed by a Robert R. Acevedo. A copy of said letter is appended hereto and made a part hereof, marked U-2. He went on to say he worked on January 3rd and was paid for 8 hours. He took photographs of his white station wagon which has a black hood. (The pictures were very dark and unclear and did not show on the xerox copier.) Copies are appended hereto and made a part hereof, marked U-3. On January 10th he called EX-2-1003 and got no answer. He then called

649-2400 and spoke to Bob Podesta telling him that he was "calling off". The telephone bill proves he made the call. A copy of said bill is appended hereto and made a part hereof, marked U-4. On January 11th he came to work, finished at 1:00 a.m. and did not get paid for that day. Because the Annex was locked, he signed for an Arrow truck. A copy of said receipt is appended hereto and made a part hereof, marked U-5. On January 12th he came in and Rezach said he was fired. He got the telegram. Article 47 of the contract states that the Company must give him a warning notice. He never received a warning notice. He introduced his Union membership card which shows his correct home address. A copy of said card is appended hereto and made a part hereof, marked U-6. He worked in the Annex and dropped his paper work in the Main Building. On January 11th he went to Buffalo but will not answer any questions in that regard. On January 3, 4, 5, 6 and 7 he made work sheets out as part of his daily work.

Mr. Podesta is an independent contractor who works on the distributors trucks. He is paid by the individual truck owners. On January 10th he received a call from the grievant who said his kid is sick and he wouldn't be in. Somebody came in and asked for the grievant. The grievant works on the Staten Island trucks that come into the plant. When the grievant called up and said his kid was sick and if anyone calls, call Sid and tell him that he wouldn't be in.

Mr. Michael Colorundo works for the Department of Correction and is licensed to carry a gun. The grievant is a good friend of his. On January 7th he met the grievant at 1:00 a.m. at Rockaway Parkway and they went to Fresh Ponds Road and had a couple. He and the grievant are very close and they socialize.

Appendix E

Decision

The undersigned has reviewed the evidence and testimony given in this hearing and is persuaded that the Company has demonstrated that the grievant is guilty of grave misconduct in his employment. By his activity he abandoned his job and constructively quit.

Therefore, I rule the Company had just cause to notify the grievant that he voluntarily quit his job and drop him from its employ.

July 7, 1983

s/ Hugh E. Sheridan
Hugh E. Sheridan
Impartial Chairman

State of New York)

County of New York) ss:

On this 7th day of July 1983 before me came Hugh E. Sheridan, to me known and known to me to be the individual described in and who executed the foregoing decision and acknowledged to me that he executed same.

s/Paul C. Maracema

PAUL C. MARACEMA
Notary Public, State of New York
No. 41 251,950
Qualified in Queens County
Commission Expires March 30, 1983

APPENDIX F — NEW JERSEY-NEW YORK AREA GENERAL TRUCKING SUPPLEMENT AGREEMENT

ARTICLE 46 — Grievance Procedure and Union Liability

Section 1. The Union and the Employer agree that there shall be no strike, lockout, tie-up, work stoppage, or legal proceedings without first using all possible means of a settlement, as provided for in this Agreement, of any controversy which might arise. Disputes shall first be taken up between the Employer and the Union involved. All grievances must be made known to the other party within five (5) days, excluding Saturdays, Sundays, and holidays, after the reason for such grievance has occurred. The five (5) day requirement does not apply to grievances involving wages, seniority and fringe benefits after the Union has secured knowledge of the grievance. In the event that the Employer and the Union involved are unable to adjust the matter, the dispute shall, within two (2) days, excluding Saturdays, Sundays and holidays, after the request of either party, be reduced to writing and referred to the Joint Local Committee and the following procedures shall than apply:

(a) Where a dispute concerns a matter of discharge the Employer and the Union shall submit the matter to final and binding arbitration. In cases of voluntary or involuntary quit, such dispute(s) may be submitted to the Joint Local Committee for decision. In the event of a case involving a voluntary or involuntary quit is deadlocked by the Joint Local Committee, such case must then be referred to arbitration as set forth below in this

Appendix F

Article. Such arbitration shall be selected through the following procedures:

* * *

. . .Local 807 to be determined by negotiations of the 807 Rider.

* * *

Within fourteen (14) days of conclusions of the arbitrator's hearing, the arbitrator shall mail, by registered mail, to all parties involved, a copy of his decision or award. Failure of any party involved to comply with such decision or award within ten (10) days thereafter, will remove restrictions against any legal or economic recourse by the other party as prohibited by Section 1 of this Article, notwithstanding any action taken to set aside, confirm, modify, or enforce such decision or award, until such time as the award is actually vacated, it being the intention of the parties that decisions and awards rendered pursuant to the procedures set forth in this Article be complied with immediately regardless of any legal proceedings. If, however, the Employer and Union agree that a dispute relative to discharge be submitted to the Joint Local Committee, the majority decision of that Committee will be final and binding on all parties. In the event such Joint Local Committee is deadlocked, the matter shall be submitted to final and binding arbitration by the Joint Local Committee as set forth above.

Appendix F

* * *

(j) In the event of strikes or work stoppages or other activities which are permitted in case of deadlock, default, or failure to comply with the majority decisions, no interpretation of the Agreement by any tribunal shall be binding upon the Union or affect the legality or lawfulness of the strike unless the Union stipulates to be bound by such interpretation, it being the intention of the parties to resolve all questions of interpretation by mutual agreement. Where a strike is alleged to be in violation of this Agreement or any law including but not limited to violations of Sections 301 or 303 of the Labor Management Relations Act, all issues of liability and damages shall be resolved pursuant to the grievance procedure.

(k) The procedures set forth herein may be invoked only by the Union's authorized representative or the Employer.

(l) The decisions of the Joint Local Committees, Joint Area Committee, the Eastern Conference Joint Area Committee and the arbitrators appointed in accordance with the procedures set forth herein shall be final and binding on all parties involved, and employee(s) affected. Such Committees or arbitrators shall not be empowered to add or to subtract from this Agreement or render any decision in conflict with the Agreement or which modifies this Agreement in any way. Such Committees or arbitrators may, in cases involving

disciplinary action including discharge, sustain any discharge or suspension or disciplinary action or modify such discharge, suspension or disciplinary action as they may deem just and equitable.

ARTICLE 47 — Discharge or Suspension

Warning Notice

Section 1. The Employer shall not discharge nor suspend any employee without just cause and the written notice of discharge or suspension must set forth the specific reason(s) for such action. In respect to discharge or suspension, the Employer shall give at least one warning notice of the specific complaint against such employee, in writing, and a copy of same to the Union and the shop steward, except that no warning notice need be given to any employee before he is discharged or suspended if he is discharged or suspended for any of the causes listed in Section 2 below or suspended for theft of time. The Employer shall not discipline any employee without just cause based upon valid written warning notices sent within the applicable time periods set forth hereinafter. No disciplinary notice shall be considered valid unless it is in writing, has been delivered to the employee, personally or by certified mail to the address given to the Employer by the employee or his job steward and sent certified mail to the Union, and sets forth therein in full the specific grounds and circumstances upon which it is based. Warning notices only, shall be handed to the employee and

not mailed to his home. No warning letter or letter of suspension shall be considered valid unless issued by the Employer within seven (7) days, excluding Saturdays, Sundays, and holidays, from the date the Employer knew of or reasonably should have become aware of the specific grounds and circumstances upon which it is based.

No disciplinary notice may be introduced in any grievance or arbitration hearing which has not been issued within six (6) months from the date of the disciplinary notice, except in the case of notices concerning accidents, within nine (9) months from the date of the disciplinary notice. Failure of an employee or Union to grieve or protest a warning letter to which no other discipline has been attached, when given, shall in no manner be deemed prejudicial to said employee in a future grievance or arbitration hearing involving said warning letter.

An employee shall not be suspended until the Local Union has been given forty-eight (48) hours written notice. Saturdays, Sundays, and holidays shall be excluded in determining the forty-eight (48) hour period.

Causes for Discharge

Section 2. The only causes for immediate discharge of an employee shall be for proven theft of money, goods, or merchandise during working hours, proven drunkenness, or proof of being

under the influence of liquor or drugs during working hours, cailing an unauthorized strike or walkout, assault on Employer or his representative during working hours, failure to report an accident which the employee would normally be aware of, proven recklessness resulting in a serious accident while on duty, or the carrying of unauthorized passengers in the vehicle while on duty, engaging in unauthorized transportation of merchandise or goods for personal gain during working hours. Although theft of time shall not be cause for immediate discharge, it is recognized as an offense for which severe disciplinary measures may be invoked. When an employee is discharged, the Employer shall notify the Union in writing.

APPENDIX G — NATIONAL MASTER FREIGHT AGREEMENT

Article 8

Section 7. All local, area and national grievance committees as constituted under this Agreement shall have the jurisdiction and power to decide grievances which arose under the preceding agreements and supplements thereto, applying, however, the contract under which the grievance arose.